the decision of this Court in *Johanns. Henderson* presents no substantive circuit conflict because it was decided only on jurisdictional grounds. *See* this Brief at 5 n.4. The same is true of *Women's Emergency Network. Id.* at 4. *Martinez* was an unpublished opinion decided solely on jurisdictional grounds. *Id.* at 4-5 n.3.

In *Hill v. Kemp*, No. 04-CV-0028-CVE-PJC (N.D. Okla. Aug. 16, 2005, *appeal docketed*, No. 05-05-5160 (10th Cir. Sept. 15, 2005), the district court decided that the TIA denied the federal courts subject matter jurisdiction, and the court did not address the First Amendment issue with regard to Oklahoma's "Choose Life" plates program that is presented the by this Petition. Likewise, in *NARAL Pro-Choice Ohio v. Taft*, No. 1:05- CV-1064, 2005 U.S. Dist LEXIS 21394, 2005 U.S. Dist. LEXIS 21394 (N.D. Ohio Sept. 27, 2005), *appeal docketed*, No. 05-4338 (6th Cir. Oct. 28, 2005), the district court refused jurisdiction based on the TIA and did not address the merits of any First Amendment claim against Ohio for issuing a "Choose Life" specialty plate. Moreover, the substance of *NARAL Pro-Choice Ohio* was, in any case, resolved by the decision of the Sixth Circuit in this case.

In *Arizona Life Coalition, Inc. v. Stanton*, No CV-03-1691-PHX-PGR,2005 WL 242811, 2005 U.S. Dist. LEXIS 21960 (D. Ariz. Sept.26, 2005), *appeal docketed*, No. 05-16971 (9th Cir. Oct. 18, 2005), the district court held that the Arizona specialty scheme was governmental speech and created a nonpublic forum, thus denying the plaintiff's request for production of an Arizona "Choose Life" plate. *Children First Foundation, Inc. v. Legreide*, No. Civ. A. 04-2137 (MLC), 2005 WL 3088334, 2005 U.S. Dist. LEXIS 28703 (D. N.J. Nov. 17, 2005) (not for publication), simply denied the State defendants' motion to abstain and to certify case for interlocutory appeal in a case involving a demand that New Jersey certify production of a "Choose Life" plate. *Choose Life Illinois, Inc. v. White*, No.

1:04-CV-04316 (N.D. Ill. filed June 28, 2004) (cross-motions for summary judgment pending), which involves plaintiffs demand that Illinois produce a "Choose Life" plate, has not yet been decided. In *Women's Resource Network v. Gourley*, 305 F. Supp. 2d 1145 (E.D. Cal. 2004), which was not appealed, the district court enjoined further issuance of specialty plates, but upheld continued production of specialty plates that served a valid state interest and did not create viewpoint discrimination.

Thus, many of the cases cited did not reach the merits of the Question Presented by the Petitioners. Two concerned the TIA issue, but not the Question Presented here. The remainder are district court decisions that are either pending or substantially agree with the decision of the Sixth Circuit here. Only the Arizona case is pending on appeal. There is, therefore, no great controversy on the substance of the Petitioners' Question Presented in trial courts or on appeal – and, indeed, this Court might profit from awaiting development of these cases and further decisions for courts of appeals in light of *Johanns*. Review of the Sixth Circuit decision is not warranted on this basis.

III. In the Wake of *Johanns*, Clarification of the Scope and Application of the Government Speech Doctrine Is Unnecessary to Alleviate Confusion Among Lower Courts.

Petitioners effectively argue that there was considerable confusion as to the nature and scope of the government speech doctrine prior to *Johanns*, noting the statements of various Fourth Circuit judges involved in the several decisions in *PPCS* and in *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Dept. of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002), *reh'g en banc denied*, 305 F.3d 241 (4th Cir. 2002), as well as other authorities. *See* Pet. at 17-18. However, the Petitioners are wrong in claiming that *Johanns* does not

effectively resolve the uncertainty. Pet. at 18-19. The "important distinctions" claimed to lie between this case and *Johanns*, Pet. at 19, do not exist.

First, Petitioners note that the *Johanns* Court observed that "[i]f a view would identify the speech as the [plaintiffs'], . . . the analysis would be different." Pet. 19 (quoting *Johanns*, 125 S. Ct. at 2064 n.7). They then assert that "[h]ere, by contrast, specialty license plates are readily associated with car owners, who select, pay extra for, and display specialty license plates on their private vehicles," Pet. 19, claiming then that it "strains credulity to claim that the messages on the plates . . . are identified with the state rather than individual car owners." *Id.* But the *Johanns* Court's reference to the Respondents in *Johanns* (like Petitioners, plaintiffs in the district court) was merely to note that the analysis would be different if, in this context, the "Choose Life" message would be attributed to the Petitioners and others who might object to this message, not to the actual purchasers/users of the "Choose Life" plates.

Of course, if the "Choose Life" message was mandatory, then Petitioners could protest it by obscuring the message. *Wooley v. Maynard*, 430 U.S. 705 (1997) (vehicle owners cannot be compelled to and may obscure display "Live Free or Die" state motto). But neither the Petitioners nor any one else are compelled to use a "Choose Life" plate under the Tenn[illegible] scheme. To the contrary, it is clear that those who c[illegible] Tennessee's "Choose Life" message are only those w[illegible] volunteer to do so, and nothing in *Johanns* suggests that its analysis would be any different at all in such a circumstance. Indeed, *Johanns* specifically noted that "the correct focus is not on whether the [challenged] ads' audience realizes the government is speaking . . ." *Johanns*, 125 S. Ct. at 2064 n.7. The Court's analysis in *Johanns* applied "whether or not the reasonable viewer would identify the speech as the government's." *Id.*

Second, Petitioners argue that *Johanns* must be distinguished because the specialty plates are funded by the individuals who purchase them rather than through general revenues – suggesting that they thus represent private, rather than government, speech. Pet. 20. To the contrary, a principal objection that the plaintiff-respondents had to the ads at issue in *Johanns* was that the ads were privately funded by them, although they objected to the ads and the messages they contained to begin with. *See Johanns*, 125 S. Ct. at 2063. If the ads at issue in *Johanns* remained government speech even over the objections of some of those who funded them, then it cannot be the case that the "Choose Life" plates message is not government speech simply because only those who agree with the message volunteer to purchase them. Government speech is not transformed into private speech simply because there are those who agree with the government message enough to voluntarily finance its publication rather than be coercively taxed to do so.

Third, the nature of the specialty plate application – encouraging purchase of specialty plates by prompting potential purchasers to "Show School Spirit" and the like – does not, as is suggested, Pet. 20, undercut the fact that the plates' messages are those of the government. By such reasoning, those who purchase and display government produced "Uncle Sam Wants You!" type posters merely express their private opinions, so that by producing such posters the government opens a public forum for which it must also produce "Uncle Sam Supports Your Choice, Whatever It Is!" posters.

Finally, Petitioners argue that the writ ought to be accepted in order to provide "this Court an opportunity to clarify whether viewpoint discrimination is automatically permitted upon a determination that government speech is involved." Pet. 21. It may be that government may not adopt some viewpoints at the expense of others, but this case certainly does not present such

a circumstance. It is well-settled that the government can express a preference for carrying children to term over abortion in its social, economic, and educational programs. *Maher v. Roe*, 432 U.S. 464, 474 (1977) (state may make a value judgment favoring childbirth over abortion in allocating public funds). *See also Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (federal government may fund family planning services, including counseling, without providing abortion and abortion counseling services); *Harris v. McRae*, 448 U.S. 297, 324 (1980) (federal government may fund conception and childbirth services without funding abortion services in service to its interest in potential life); *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (city hospital may provide childbirth services without providing abortion services in preference to childbirth over abortion).

The "Choose Life" message of the "Choose Life" specialty plate is, in fact, a rather minor aspect of the "Choose Life" law, which is primarily concerned with providing funds to alternatives to abortion agencies in furtherance of the same governmental interests directly acknowledged in *Maher*, *Poelker*, *McRae*, and *Rust*. Thus, Tennessee is fully warranted in discriminating in favor of a pro-natalist position in seeking to serve its interest encouraging childbirth.

IV. The Sixth Circuit's Reasoning Is Consistent With This Court's Precedents.

The Sixth Circuit decision is in harmony with prior decisions of this Court on government speech, contrary to the claims of the Petitioners. Petition 22-34. There is certainly no direct conflict with any prior precedent of this Court sufficient to warrant review.

First, Petitioners argue that the Sixth Circuit is contrary to *Wooley v. Maynard*, 430 U.S. 705 (1977), which held that vehicle owners were constitutionally warranted to obscure the

New Hampshire "Live Free Or Die" motto on their plates, demonstrates that private speech rights are at issue even with regard to standard plates. Pet. 24. If this is so, they imply, then the "Choose Life" message on the Tennessee plates cannot represent pure government speech since it is voluntarily purchased and displayed as consistent with the vehicle owners' private views. *Id.*

In *Wooley*, however, the issue was whether a private vehicle owner could be required to publish the government "Live Free Or Die" message on his licence plates – whether private speakers had to become involuntary mouthpieces to communicate a state message as the price driving legally. It is about compelled government speech, not private speech. Here, the issue is whether the government can use volunteers to communicate its message, not whether government speech is transmuted into private speech because private persons choose to communicate it. There is nothing inconsistent about holding, as *Wooley* did, that the government cannot compel citizens into participating in an advertizing campaign with which they do not agree – and holding, as the Sixth Circuit did, that a government advertizing campaign remains just that when it relies on free help. A war is a war, regardless whether the army is drafted or consists of volunteers.

Second, Petitioners claim that the Sixth Circuit decision conflicts with *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001). Pet. 23. They claim that just as the "purpose of the Legal Services Corporation ["LSC"] programs was to facilitate private speech, not a governmental message," the overall purpose of the specialty license program is to promote private speech rather than a government message. *Id.* (quoting *Velasquesz*, 531 U.S. at 542).

But the LSC program involves government funding of confidential attorney-client communications and representation

of private individuals in civil matters. It is obviously and fundamentally different from the specialty license program – which involves vehicle owners purchasing plates that broadly communicate legislatively-dictated messages to raise money for legislatively-sanctioned social, economic, and educational programs. To fund the lawyer-client relationship is to fund private speech bounded by rules of privilege and confidentiality – quite the opposite of the Tennessee specialty license plate program, which involves broadcasting government messages to the world at large and raising money to serve legitimate state interests.

Finally, the Petitioners claim that the Tennessee "Choose Life" license plate program represents viewpoint discrimination because the Tennessee legislature twice refused to enact legislation authorizing a "pro-choice" plate. Pet. 23-24. They further argue that "viewpoint discrimination is never permitted," whether involving "the traditional public forum, the designated or limited public forum or the nonpublic forum." *Id.* at 23 (*citing Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983)). Two of the cases they cite support the proposition that the legislature cannot practice viewpoint discrimination in public and limited public fora. *See Rosenberger*, 515 U.S. at 829-30 (university funded publication is a limited public forum); *Mosley*, 408 U.S. at 96 (public forum involved in a subject matter prohibition from public sidewalk picketing).

The third case they cite, *Perry*, involved the non-public forum of an public school inter-school mail program that allowed access to the teachers' authorized collective-bargaining agent, but not to another competing labor organization. The *Perry* Court observed that such "distinctions may be impermissible in a public forum but are inherent and

inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." 460 U.S. at 49. As *Perry* concluded, "The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Id.* The Tennessee specialty license program is intended to fund programs that serve legitimate interests, as all the specialty plate programs do, and, at least in some cases, to communicate messages compatible with legitimate governmental interests. In particular, its "Choose Life" program serves a legitimate interest in furthering childbirth, both through its license plate message and, especially, the programs to assist pregnant women that it is intended to fund – an interest that *Maher*, *Poelker*, *McRae*, and *Rust* fully support in holding that the government may serve an interest in encouraging childbirth in preference to abortion. It follows that *Perry* is fully consistent with the decision of the Sixth Circuit at issue here, and that no case cited by the Petitioners warrants review of that decision as in conflict with this Court's precedents.

CONCLUSION

On the basis of the foregoing, this petition for a writ of certiorari should be denied.

Respectfully submitted,

James Bopp, Jr.
Counsel of Record
Thomas J. Marzen
Anita Y. Woudenberg
HORATIO R. STORER
FOUNDATION, INC.
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
Ph. 812/232-2434
Fx. 812/235-3685
Counsel for Respondent New Life Resources, Inc.

May 16, 2006